89-246

No.: _____

IN THE

Supreme Court of the United States

October Term, 1989

ARNOLD SQUITTIERI and ALPHONSE SISCA,
Petitioners,

-against-

UNITED STATES OF AMERICA,
Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

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QUESTIONS PRESENTED

1. Whether a Criminal Defendant May Stipulate to Intent and Knowledge, and Thereby Eliminate Any "Proper Purpose" for the Admission of Other Crimes Evidence Under *Huddleston v. United States,* 108 S.Ct. 1496 (1988)?

2. Whether a Uniform "Clear and Convincing" Standard for Authentication of Tape-Recordings Is Required Because Such Evidence Makes a Strong Impression on Juries and It Is Particularly Susceptible to Alteration?

3. Whether the "Expert" Testimony and Conclusions of Drug Enforcement Agents on Ultimate Issues of Fact, Now Routinely Offered in Narcotics Cases As a Substitute for Direct Evidence, Violates the Fifth Amendment Right to Due Process of Law?

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Petitioners, Arnold Squittieri and Alphonse Sisca, respectfully pray that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Third Circuit entered on June 12, 1989.

OPINIONS BELOW

The decision of the Court of Appeals is reprinted in the Appendix at pages PAA1.[1] The opinions of the United States District Court for the District of New Jersey overruling petitioners' objections to the challenged evidence appear in the Appendix at pages "PAB" through "PAC," corresponding to the Point headings.

1. References to the Appendix to this Petition are preceded by "PAA," "PAB," or "PAC," followed by the page number.

JURISDICTION

The judgment of the Court of Appeals for the Third Circuit was entered on June 12, 1989. The jurisdiction of the Court is invoked pursuant to Title 28, U.S.C. Sec. 1254(1).

CONSTITUTIONAL PROVISIONS

The Fifth Amendment to the Constitution of the United States provides in pertinent part:

> nor shall any person .... be deprived of life, liberty, or property without due process of law....

STATUTORY PROVISIONS

Title 21, U.S.C. Sec. 841, provides in pertinent part:

> Unlawful acts
>
> (a) Except as authorized by this subchapter, it shall be unlawful for any person knowingly or intentionally --
>
> (1) to manufacture, distribute, or dispense, or possess with intent to manufacture, distribute, or dispense, a controlled substance; or
>
> (2) to create, distribute, or dispense, or possess with intent to distribute or dispense, a counterfeit substance.

The Federal Rules of Evidence provide in pertinent part:

> Rule 404(b)
>
> (b) Other crimes, wrongs, or act. -- Evidence of other crimes, wrongs, or acts is not admissible to prove the character of a person in order to show

action in conformity therewith. It may however, be admissible for other purposes, such as proof of motive, opportunity, intent, preparation, plan, knowledge, identity, or absence of mistake or accident.

Rule 901(a)

Requirement of Authentication or Identification

(a) General provision
The requirement of authentication or indentification as a condition precedent to admissibility is satisfied by evidence sufficient to support a finding that the matter in question is what its proponent claims.

Rule 701

Opinion Testimony By Lay Witnesses

If the witness is not testifying as an expert, the witness' testimony in the form of opinions or inferences is limited to those opinions or inferences which are (a) rationally based on the perception of the witness and (b) helpful to a clear understanding of the witness' testimony or the determination of act in issue.

Rule 702

Testimony of Experts

If scientific, technical, or other specialized knowledge will assist the trier of fact to understand the evidence or to determine a fact in issue, a witness qualified as an expert by knowledge, skill, experience, training, or

education, may testify thereto in the form of an opinion or otherwise.

Rule 403

Exclusive of Relevant Evidence On Grounds Of Prejudice, Confusion, or Waste of Time

Although relevant, evidence may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury, or by consideration of undue delay, waste of time, or needless presentation of cumulative evidence.

STATEMENT OF THE CASE

The petitioners, Arnold Squittieri and Alphonse Sisca, were convicted after a jury trial in the District of New Jersey (Brotman, J.) of conspiring to violate and violating the narcotics laws, Title 21 U.S.C. Sections 841 and 846 (A. 6, 14).[2]

Each petitioner was sentenced to a term of imprisonment of 17 years, given a special parole term of 6 years, and each was fined an aggregate amount of $100,000. On June 12, 1989, the United States Court of Appeals for the Third Circuit affirmed the convictions (PAA 1).

According to the government's proof at trial, in October of 1981 and again in June of 1982, Squittieri and Sisca sold a kilogram of heroin to Richard Pasqua, the prosecution's principal witness at trial. The government posited that these heroin sales were part of a conspiracy in which petitioners served as middlemen, purchasing and then reselling heroin.

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2. References in parentheses preceded by the letter "A" refer to the Joint Appendix filed in the Court of appeals. References to the Record on Appeal bear the prefix "R" followed by the appropriate pages of the trial transcript on that day. The prefixes "GX" and "DX" are citations to government and defense exhibits respectively.

This petition raises increasingly important issues under the Fifth Amendment guarantee of due process of law, particularly in narcotics cases where the body of admissible evidence continues to swell beyond all traditional bounds. In order to bolster the credibility of the government's main witness -- who provided the only direct evidence of the transactions -- the government introduced the following evidence: 1) evidence of other crimes; 2) electronic surveillance tapes made during a separate investigation; and 3) expert testimony from a narcotics agent. This petition explores the desperate need for standards for the admission of such evidence in order to preserve the criminal defendant's right to a fair trial.

Richard Pasqua, a career criminal with a long history of violent anti-social behavior, testified that he had known the petitioners as neighbors and family friends since the mid-1960's. Over objection and ostensibly to show knowledge, intent and criminal association, Pasqua testified that in 1968 he sold a quantity of stolen quinine, used to dilute heroin, to the petitioners (R. 6/22/88, pp. 46-53 A. 52). In 1980 and 1981, Pasqua and Sisca were again neighbors, this time as inmates at the Lewisburg Penitentiary. Pasqua was imprisoned for a violation of parole following his incarceration on a stolen treasury bond conviction (R. 6/22/88, pp. 60-63). Petitioner Sisca was imprisoned on a 1973 narcotics conviction. This prior conviction and the stolen quinine episode were introduced despite the petitioner Sisca's willingness to stipulate on the issue of intent.

Pasqua testified to a conversation with Sisca in prison, which pre-dated the conspiracy, about heroin trafficking and Sisca's plans to create a large-scale heroin business upon his release from prison (R. 6/22/88, pp. 72-73). Also over objection, Pasqua recalled prison conversations with Sisca about Squittieri and Squittieri's relationship with reputed organized crime figure John Gotti (R. 6/22/88, pp. 74-75).

Pasqua testified that, following his release from prison, he was actively engaged with a partner in selling

heroin (R. 6/22/88, p. 81). Pasqua claimed that in the fall of 1981, he had a number of conversations with Sisca about the heroin trade and Pasqua's interest in purchasing a kilogram (6/22/88, pp. 81-85). These discussions culminated in two meetings during which Pasqua paid the petitioners $180,000.00 for a kilogram of heroin (R. 6/22/88, pp. 85-98).

Eight months later, Pasqua purchased another kilogram of heroin from the petitioners, which was delivered to Pasqua on his promise to pay for it the next day (6/22/88, pp. 104-110). Two days later, after distributing the heroin to his customers, Pasqua paid $50,000 to Sisca and appealed for more time to pay the $130,000 balance (R. 6/22/88, p. 146).

Thereafter, Pasqua had a third meeting with petitioners, who were accompanied by unindicted co-conspirator Angelo Ruggiero, whom Pasqua knew from the streets of Queens, New York and the corridors of prison (6/22/88, p. 148). Pasqua sought additional time to pay for the heroin, despite Ruggiero's impatience (6/22/88, pp. 150-152). Pasqua ultimately paid the balance in two installments (R. 6/22/88, pp. 154-155). After June of 1982, Pasqua returned to jail and never did business with petitioners again (R. 6/22/88, pp. 156).

Pasqua's regular use of heroin and cocaine and his extensive criminal history provided a shaky foundation for the government's case (6/22/88, pp. 82-83). He had committed countless assaults, including the assault of a police officer (R. 6/22/88, p. 40), armed robberies, hijackings (R. 6/22/88, p. 43), shootings (R. 6/22/88, p. 55), stolen property offenses (R. 6/22/88, p. 60), auto theft (R. 6/22/88, p. 63), and negotiation of stolen travelers checks (R. 6/22/88, p. 63). Before reaching an agreement with the government, Pasqua principally earned his living (when not incarcerated) by selling narcotics (R. 6/22/88, p. 81). Rewarded handsomely for his agreement to testify, Pasqua was relocated and supported by the government in the Witness Protection Program, and he was sentenced to time served (18 months) on his most recent federal prosecution as well as on a New York State prosecution (R. 6/22/88, p.

172). He received complete immunity for all of his narcotics offenses (R. 6/22/88, p. 172).

In order to shore up the case from a different angle, the government sought to establish that unindicted co-conspirator Ruggiero and others supplied heroin to Sisca and Squittieri. Since the government was in possession of electronic surveillance tapes of the home and telephone of Ruggiero from November 1981 through July 1982, authorized during a separate investigation, it introduced a carefully tailored set of isolated conversations or parts of conversations in order to forge the desired connections. Recorded telephone conversations were introduced to establish that Ruggiero, Sisca and Squittieri all knew each other; frequently met with each other; Sisca's nickname was "Funzi" and Arnold Squittieri's nickname was "Zeke" (GX 1101-111). The house conversations allegedly showed that Ruggiero dealt in heroin and that "Arnold and Funzi" were heroin customers. Following a circuitous path leading from these tape recorded conversations, the government introduced surveillance testimony and proof of an arrest on June 23, 1982 of two individuals named Cestaro and Greco, who were apprehended while exchanging cash for heroin. An FBI agent observed John Carneglia, claimed to have been one of Ruggiero's heroin partners, talking to Sal Greco on May 7, 1982 (R. 6/24/88, pp. 39-47). Another officer saw Carneglia and Ruggiero together (R. 6/29/88 pp. 28-29). At the time of Greco's arrest, agents seized from him a telephone book with Carneglia's telephone number in it.

As a result of this line of proof, evidence of a two kilogram seizure along with nearly $150,000 was placed before the jury. The arrest and seizure taken together with the tapes were intended to show that the references by Ruggiero in the recorded conversations were to heroin and that notations in "records" seized from Greco referred to the petitioners as Ruggiero's customers (A. 800). In order to further prove association, the government introduced physical surveillance testimony to the effect that Ruggiero and the petitioners met at a Deli in Queens, although there

were no observations of criminal conduct (7/5/88, pp. 16, 30; 6/16/88, p. 77).

In an effort to draw together and explain the references found in the tape evidence and documents seized from Greco, the government called Drug Enforcement Agent Gerald Franciosa who testified as an expert on the subject of the terminology and methods used by heroin traffickers (A. 683). Without any personal knowledge of the case, save listening to the tapes, Franciosa testified that Ruggiero and his co-conspirators were, in fact, discussing narcotics (A. 698). Over objection, he was permitted to conclude that "Zeke," often times referred to as Arnold, and "Funzi" were consignment heroin customers of Ruggiero (A. 790-791). Franciosa was permitted to describe the relevance and significance of the Cestaro-Greco arrest, in effect arguing that it was directly tied to transactions arranged by Ruggiero and his partners (A. 808-809).

I

CERTIORARI SHOULD BE GRANTED IN ORDER TO RESOLVE A CONFLICT AMONG THE CIRCUITS ON WHETHER A DEFENDANT MAY STIPULATE TO INTENT AND KNOWLEDGE AND OBVIATE THE NEED FOR RULE 404(b) EVIDENCE.

The central factual issue in this case, as framed by the indictment, was whether petitioners conspired with and sold heroin to Richard Pasqua between September of 1981 and June of 1982. This core question was shrouded in an elaborate presentation of proof inviting corroborative inferences. With all of the physical and electronic surveillances, however, there was no direct support for the specific claims made by Richard Pasqua.

Exploring various avenues to bolster its case, the government sought admission of certain other crimes evidence pursuant to Rule 404(b) of the Federal Rules of Evidence. Over strenuous objection, the trial court admitted proof that in 1968 petitioners purchased stolen quinine, a

heroin diluent, from Richard Pasqua. Pasqua's testimony was the exclusive source of proof. The purpose of this offer was to prove knowledge and intent, as well as to show the background and nature of the relationship between petitioners and the witness (A. 52). Also over objection, the government was permitted to introduce Alphonse Sisca's 1973 narcotics conspiracy conviction. *United States v. Sisca,* 503 F.2d 1337 (2d Cir.), *cert. denied,* 419 U.S. 1008 (1974) (R. 7/5/88, pp. 9-11). The earlier conviction, purportedly admitted against Sisca alone, was introduced as relevant to the issue of Sisca's knowledge and intent, even though Sisca offered to stipulate to intent and proposed a jury charge that would eliminate the issue (A. 45-50). There can be no doubt that this other crimes evidence substantially contributed to petitioners' convictions. Because there is a conflict among the circuits as to whether an accused may stipulate on the issue of intent and spare himself the inherently prejudicial impact of prior crimes evidence, a writ of certiorari should be granted.

In trial after trial, prosecutors seek admission of 404(b) proof because it is one of the most powerful weapons in the government's arsenal. Thus, litigation has been fierce in this area and the Rule 404(b) territory is cluttered with conflicting opinions. Although the standard of review in most cases is whether the trial court abused its discretion, a stipulation removing the issue of intent obviates the need for any exercise of discretion. A ruling by the Supreme Court will provide necessary guidance to the courts on the narrow question of whether criminal defendants may pursue the option of stipulation.

The analysis begins with the question of whether the other crimes evidence had any bearing on a relevant issue in the case. Recently, this Court in *Huddleston v. United States,* ____U.S.____, 108 S.Ct. 1496 (1988) outlined the guidelines for admission of other crimes evidence under Rule 404(b). To be admissible, the evidence must be relevant and it must have a proper purpose. In addition, the probative value of the other crimes evidence must outweigh its potential for unfair prejudice, and, if so, the court must

give an appropriate limiting instruction to the jury upon admission. *Id.* at 1502.

All of the Rule 404(b) cases, as well as the Rule itself, express a deep concern about the potential for misuse of prior crimes evidence. Thus, there is a general prohibition against evidence intended to prove a defendant's propensity to commit criminal acts or to suggest to the jury unfavorable inferences reflecting on a defendant's character. *United States v. Scarfo,* 850 F.2d 1015, 1018 (3d Cir.), *cert. denied* _____ U.S._____, 109 S.Ct. 263 (1988). In this case, however, there was neither need -- what Chief Justice Rehnquist called a "proper purpose" -- nor relevance in Sisca's 1973 narcotics conviction and Pasqua's testimony about a stolen quinine transaction.

The defense in this case was that the defendants did not commit the crimes charged. There was no defense of innocent state of mind or lack of knowledge. Sisca's counsel clearly framed the only issue at trial as whether the jury would believe Pasqua's testimony (A. 26).

Lacking a "proper purpose," it is clear that the government introduced this 404(b) evidence in order to show the petitioners' propensity to commit crimes. Sisca's prior *narcotics* conviction was therefore devastating. Although the 1968 stolen quinine episode was purportedly offered to show a "relationship" between Sisca and Pasqua, Pasqua testified that he did no "business" with either of the petitioners between 1968 and the opening date of the conspiracy in September 1981. Thus, the evidence did not show an ongoing relationship which in other circumstances might be relevant. *United States v. Simmons,* 679 F.2d 1042, 1050 (3d Cir. 1982), *cert. denied sub nom. Brown v. United States,* 462 U.S. 1134 (1983); *United States v. Dansker,* 537 F.2d 40 (3d Cir.), *cert. denied* 429 U.S. 1038 (1977) (other crimes evidence revealed the relationship between government's witness and defendants close to and during the time period of the indictment and established a *modus operandi* relevant to the alleged bribery scheme).

Any relationship that existed in 1968 simply was not probative of a relationship that existed in 1981, after a 12-

year hiatus. This is especially so where the government already had the benefit of admissions by Sisca allegedly made during the Lewisburg prison conversations immediately preceding this conspiracy. As the First Circuit stated in *United States v. Lynn,* 856 F.2d 430, 435 (1st Cir. 1988), "it is hard to discern a common non-propensity thread connecting [the similar act with the act charged]." Here too, there was no discernible "nonpropensity thread." There was in this case no clear and logical connection between the 1968 episode and the 1981 conspiracy. All that the jury could have inferred from this proof was that defendants, who engaged in illegal conduct in the past, were probably guilty of the current charge because of a propensity to commit narcotics offenses.

As this analysis demonstrates, if the court had accepted the defense offer to stipulate that intent was not in issue, the admission of 404(b) evidence would clearly violate this court's proscription in *Huddleston, supra.* Therefore, it squarely presents for resolution a significant issue dividing the Circuit Courts of Appeals -- whether a defendant may stipulate to intent and knowledge and, thus, negate the "proper purpose" required in order to introduce other crimes evidence.

A. The Second Circuit Approach - *United States v. Figueroa.*

The Second Circuit has held that a criminal defendant may completely prevent the admission of other crimes evidence concerning the issue of intent by:

> Express[ing] a decision not to dispute that issue with sufficient clarity that the trial court will be justified (a) in sustaining objection to any subsequent cross-examination or jury argument that seeks to raise the issue and (b) in charging the jury that if they find all the other elements established beyond a reasonable doubt, they can resolve the issue against the defendant because it is not disputed.

United States v. Figueroa, 618 F.2d 934, 942 (2d Cir. 1980).

See also United States v. Mohel, 604 F.2d 748, 753-54 (2d Cir. 1979). Intent is not placed in issue by a defense that the defendant did not do the charged act at all. *United States v. Manafzadeh,* 592 F.2d 81, 87 (2d Cir. 1979); *United States v. O'Connor,* 580 F.2d 38, 41 (2d Cir. 1978). Thus, when a defendant unequivocally relies on a defense that he "didn't do it," evidence of other acts is not admissible for the purpose of proving intent. *United States v. Figueroa,* 618 F.2d at 940-41; *United States v. Mohel,* 604 F.2d at 753; *United States v. Manafzadeh,* 592 F.2d at 87. *See also United States v. Ortiz,* 857 F.2d 900, 903-904 (2d-Cir. 1988).

The *Figueroa* doctrine comports with the *Huddleston* "proper purpose" rule. In reasoning similar to *Figueroa,* the Fifth Circuit, in *United States v. Silva,* 580 F.2d 144, 148 (5th Cir. 1978), reversed a conviction and stated that it was not the statute but the circumstances of the case and the nature of the defense which revealed whether intent was a material issue in the case. *See also United States v. Adderly,* 529 F.2d 1178 (5th Cir. 1976).

Petitioners respectfully urge this Court to adopt the Second Circuit's *Figueroa* doctrine which unquestionably would require reversal of their convictions. *United States v. Figueroa,* 618 F.2d at 944 ("erroneous admission of a defendant's prior conviction normally warrants a new trial...").

B. The Third Circuit's Decision In *United States v. Schwartz.*

Contrary to the Second Circuit, the Third Circuit in *United States v. Schwartz,* 790 F.2d 1059 (3d Cir. 1986), ruled:

> The defendants expressed willingness to stipulate to substantial portions of the government's case does not, of course, preclude the government from presenting relevant, admissible, evidence. *See United States v. Chaimson,* 760 F.2d 798, 805-06 (7th Cir. 1985). *But see United States v. Manafzadeh,* 592 F.2d 81, 87 (2d Cir. 1979). Generally speaking, it is for the

> prosecutor, not the defendants, to shape the government's trial strategy with a view towards sustaining its heavy burden of proof. On the other hand, the presence or absence of a genuine need for the questioned evidence is a legitimate part of the balancing analysis required by F.R.Evid., 403. *See also United States v. Herman,* 589 F.2d 1191, 1198 (3d Cir. 1978).

Id. at 1061. (Emphasis supplied). Although the two Circuits disagree on the question of the preclusive effect of a stipulation, the result was the same in both cases. Under the Second Circuit's *Figueroa* doctrine, withdrawal of the element of intent rendered the proof inadmissible because it was no longer relevant. Under *Schwartz,* the conviction was reversed because the probative value of the evidence was outweighed by its prejudice -- counsel's stipulation had diminished the need for the evidence. Because the Third Circuit ultimately left the issue to the discretion of the trial court, injustices in application, such as the one that occurred in this case, will continue to occur.

C. Squittieri Was Equally Prejudiced By Evidence Of Sisca's Prior Crimes.

The trial court charged the jury that Sisca's conviction could only be considered against Sisca and not Squittieri (R. 7/5/88, p. 11 and A. 885). Because there are few cases where co-defendants are tried more closely as "birds of a feather," *United States v. DeCicco,* 435 F.2d 478, 483 (2d Cir. 1970), the prejudicial spillover was extreme. Petitioners were portrayed more as a couple than as co-defendants and their relationship dated back several decades. (R. 7/5/88, p. 13).[3] Portrayed as Sisca's long-time partner, there was a strong implication that Squittieri was

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3. Fearing the prejudice of Sisca's conviction, Squittieri's counsel repeatedly moved for a severance (A. 31; 6/16/88, pp. 14-15, 41).

Sisca's partner in 1973 and therefore he too was involved in the narcotics activity underlying Sisca's conviction. Under these circumstances, as the Second Circuit recognized, "it is doubtful whether the risk of prejudice to co-defendants can be adequately safeguarded by limiting instructions." *United States v. Figueroa,* 618 F.2d at 947. Indeed this Court has recognized that there are cases where limiting instructions are inadequate. *Bruton v. United States,* 391 U.S. 123, 134 (1968). Thus, if admission of Sisca's conviction was reversible error, Squittieri's conviction will likewise require reversal.

Richard Pasqua's testimony about the 1968 stolen quinine transaction was admitted against both Sisca and Squittieri (A. 885-886). The exclusive proof of this quinine transaction came from Richard Pasqua. Pasqua testified that in 1968 he sold a stolen trailer load of quinine to Alphonse Sisca and "a couple of his friends" at a club in Harlem (R. 6/22/88, p. 46-51). When pressed to recall the "other guys" that Pasqua had spoken to at the club, Pasqua ultimately mentioned Squittieri. Pasqua clearly indicated, however, that Sisca bought the quinine (R. 6/22/88, pp. 51-53). Nevertheless, without an adequate evidentiary foundation, the Court instructed the jury to use this evidence against *both* defendants. As this Court cautioned in *Huddleston,* "this is not to say, however, that the Government may parade past the jury a litany of potentially prejudicial similar acts that have been established or connected to the defendant only by unsubstantiated innuendo." *Huddleston v. United States,* 108 S.Ct. at 1501. Chief Justice Rehnquist wrote that, "similar act evidence is relevant only if the jury can reasonably conclude that the act occurred and that the defendant was the actor." *Id.*

Here, the jury could only reasonably conclude that Squittieri was an "actor" if they lumped the co-defendants together. Squittieri's mere presence at the club, even coupled with knowledge that others were committing a crime, was plainly insufficient. *United States v. Dixon,* 658 F.2d 181, 189 (3d Cir. 1981); *see Nye and Nissen v. United States,* 336 U.S. 613, 619 (1949). Petitioners contend that

this quinine transaction, for the reasons earlier stated, should not have come in at all and that its admission, standing alone or taken together with admission of Sisca's 1973 conviction, warrants reversal of the convictions.

II

CERTIORARI SHOULD BE GRANTED IN ORDER TO RESOLVE A CONFLICT AMONG THE CIRCUITS ON THE PROPER STANDARD FOR AUTHENTICATION OF ELECTRONIC SURVEILLANCE TAPES.

As an essential part of the prosecution's proof at trial, the government played a number of conversations electronically intercepted from the home and over the home telephone of Angelo Ruggiero. These conversations allegedly contained references to the petitioners as purchasers of heroin, which was then sold to the government's cooperating witness, Richard Pasqua.

In order to establish the authenticity of the tapes pursuant to Rule 901(a), Fed.R.Evid., the government attempted to trace the chain of custody of the tapes through the testimony of various federal agents and technicians who handled them. These witnesses, however, did not reconstruct a chain of custody so as to sufficiently authenticate the tapes. Although the trial court ruled that the essential "links" in the chain of custody were sufficiently forged (A. 934, 939), the testimony of each witness revealed more gaps in the chain than it did "links." The direct testimony of each witness did little more than establish the general handling procedures at each stage, while cross-examination demonstrated that those procedures were not followed and that the integrity of the tapes was in jeopardy a great deal of the time.

In *United States v. Jackson*, 649 F.2d 967 (3d Cir. 1981), *cert. denied* 454 U.S. 871, the Third Circuit established the standard for authentication based upon a chain of custody theory. Evidence is admissible and deemed authenticated if the prosecution demonstrates "a reasonable

probability that the evidence has not been altered in any material respect since the time of the crime." *Id.* at 973, citing *United States v. Luna,* 585 F.2d 1, 6 (1st Cir.), *cert. denied* 439 U.S. 852 (1978), citing *United States v. Brown,* 482 F.2d 1226, 1228 (8th Cir. 1973). In applying this standard, the trial judge may rely upon a "presumption of regularity in the handling of exhibits by public officials." *Id.* at 973-974, citing *United States v. Coades,* 549 F.2d 1303, 1306 (9th Cir. 1977). Significantly, the Third Circuit standard did not arise out of a case involving tape recorded evidence. In *Jackson,* the chain of custody of morphine capsules was attacked because the capsules were transferred in unsealed envelopes and kept in an unsecured locker. 649 F.2d at 973. It is submitted that the *Jackson* standard is insufficient when applied to tape recorded evidence.

This standard for authentication stands in stark contrast with the "clear and convincing" standard prevailing in the Second Circuit. In adopting the higher standard, the Second Circuit in *United States v. Fuentes,* 563 F.2d 527, 532 (2d Cir. 1977), *cert. denied* 434 U.S. 959, acknowledged that "recorded evidence is likely to have a strong impression upon a jury and is susceptible to alteration...." *But cf. United States v. Mendel,* 746 F.2d 155, 167 (2d Cir.), *cert. denied* 469 U.S. 1213 (1985). In *United States v. Cortellesso,* 663 F.2d 361, 364 (1st Cir. 1981), the First Circuit also recognized "the susceptibility of tape recordings to sinister forces, even within the federal government" and applied the "clear and convincing" standard. *Accord United States v. Balzan,* 687 F.2d 6, 8 (1st Cir. 1982). *But cf. United States v. Rengifo,* 789 F.2d 975, 978 (1st Cir. 1986). The Seventh Circuit has likewise adopted the higher "clear and convincing" standard for establishing the authenticity of tape recordings. *See United States v. Faroute,* 749 F.2d 40, 43-44 (7th Cir. 1984) (defense tape which was recorded and testified to by defendant excluded for failure to authenticate by clear and convincing evidence); *United States v. Blakey,* 607 F.2d 779, 787 (7th Cir. 1979).

In applying the "clear and convincing" standard for

authentication, the First, Second, and Seventh Circuits have recognized the uniqueness of tape recorded evidence and the necessity for greater precautions to assure that the authenticity requirement is satisfied.

The petitioners argued in the Court of Appeals that the prosecution's proof at trial did not establish an adequate chain of custody so as to properly authenticate the tapes even under the Third Circuit standard, and certainly would not have passed muster under the "clear and convincing" standard.

Not only did every witness testify that there were gaps in the chain, but also that specified FBI procedures were not followed. Special Agent William Noon and a private audio-technician, Thomas Carroll, revealed a situation where tapes were not in their proper envelopes, although Special Agent Walter Ticano supposedly reviewed the tapes and custody information every morning (A. 94-97; 451-454; 462-467, 488-492). Although each agent who received and then released a tape was supposed to record his name and the date on the envelope, at least one "FBI employee" who delivered tapes from Gerald Callahan, an FBI audio-technician, to Agent Ticano either was not apprised of or did not feel bound by this rule (A. 596-599).

Moreover, although Agents Donald McCormick, Noon and Ticano went to great lengths in describing how the tapes were kept in a locked credenza and cabinet with only one existing key at the FBI offices in Queens, Callahan did not utilize any safekeeping procedures at the Manhattan office, where hundreds of agents had access to the tapes (A. 581-583; 589-591).

Although two original copies of the tapes were recorded in tandem -- one used by the agents for work purposes (the duplicate original) and one safeguarded (the original) -- the trial court expressed surprise that the FBI did not keep one set that was never touched (A. 639). Both technicians, Callahan and Carroll, testified that originals were worked on and enhanced (A. 132-136; 543-544). Callahan could not even recall whether he or someone else did the work (A. 590). Carroll, on the other

hand, knew he did the work but described how the enhanced tapes sometimes had fewer words and sentences than a transcript made from the duplicate original, unenhanced tape (A. 162-170). It was clear that original tapes were subject to alteration and were, in fact, changed substantially. They were also handled by numerous agents and technicians contrary to procedure.

Finally, Agent McCormick provided a concrete example of a breach of integrity during the investigation and while he was responsible for supervising the electronic surveillance. A combination of circumstances, including a broken cabinet lock left unrepaired, resulted in the removal and dissemination of his wiretap order notes (A. 529-533; 542-543). The petitioners went far beyond speculation based upon mere opportunities for tampering. McCormick demonstrated that "accidents do happen." Thomas Carroll explained exactly how an "accident" could occur resulting in the alteration of the tapes by splicing, dubbing and re-recording, all undetectable except by expert. Carroll was expert enough to do the alterations, but not to detect them (A. 97-104, 123, 176).

Despite admitting the tapes, the trial court acknowledged that "the government's handling of the Ruggiero tapes from the time of their creation up through the time of trial has hardly been exemplary." He counseled the government to "establish more efficient and accountable procedure for their preservation in the future" (A. 942).

The trial testimony, taken as a whole, demonstrated that the FBI's procedures were not followed. The "presumption of regularity" was rebutted by showing numerous gaps in the chain of custody and actual breaches of procedure and integrity, as well as the existence and feasibility of an effective method of tampering. The tapes should not have been admitted under the Third Circuit standard of authentication, and certainly not under the "clear and convincing" standard. Certiorari should be granted in order to consider the necessity for a uniform standard in tape cases.

III

CERTIORARI SHOULD BE GRANTED IN ORDER TO REVIEW THE CONSTITUTIONAL IMPLICATIONS OF THE EVER-EXPANDING USE OF EXPERT TESTIMONY IN NARCOTICS CASES.

In order to fortify the impact of disparate pieces of evidence, the prosecution called Drug Enforcement Agent Jerry Franciosa as an expert familiar with the terminology of heroin dealers (A. 682). This practice has become routine in narcotics cases and poses an increasingly severe threat to the fundamental right of criminal defendants to a fair trial. In narcotics cases, experts are offering bolder and bolder conclusions on the ultimate issues of fact -- that narcotics transactions occurred and that the defendants were dealers or middlemen. The danger that juries may decide cases on the basis of conclusions from "expert" drug enforcement agents rather than on evidence is and should be anathema to the American System of Criminal Justice.

The expert testimony in this case went far beyond explaining the specific terminology and methodology of drug dealing. Franciosa testified at length about numerous conversations on the tapes which were either uncoded and clear or which referred to prior conversations which the jury heard and could connect as competently as an expert. Franciosa conducted a thorough textual analysis of the conversations, repeatedly rephrasing uncoded conversations. Indeed, Franciosa's actual expertise in explaining language and methods came into play only a few times during the course of over two hundred pages of testimony. The vast majority of the time he commented upon various conversations and placed them in context without in any way exercising his particular expertise. Moreover, he was permitted to conclude ultimately that the petitioner dealt heroin on consignment (A. 790-791). Repeatedly in the trial court, the petitioners objected to Franciosa's testimony as a "summation" which invaded the province of the jury (A. 684, 731).

The prosecutor's direct-examination of Franciosa was conducted by reading him portions of the transcript and eliciting his "translation" (A. 700-707, 718, 788-795). From a review of the expert testimony summarized in the Court of Appeals, it was obvious that those portions of the recorded conversations were straightforward. The words "heroin" and "coke" were used openly in an earlier conversation to which the latter conversations related. The closest the speakers came to using code language was the word "things," hardly a cryptanalyst's nightmare (A. 788-790). It was clear that Agent Franciosa undertook to do the lion's share of the prosecutor's and the jury's work. He highlighted the damaging conversations, continually reminding the jury of prior similar and related conversations. This was a prosecutor's summation rather than an exercise of specialized, technical expertise (A. 731).

The most egregious conclusion Franciosa was asked to draw occurred in response to a "hypothetical" posed by the prosecutor. The prosecutor posited all of the facts and circumstances of the Cestaro/Greco heroin transaction proven at trial and Franciosa opined that the transaction was related to a prior conversation between Ruggiero and Cestaro. Franciosa also interpreted certain notations on alleged "drug records" seized from Greco when he was arrested, explaining their relationship to recorded conversations (A. 799-814). Franciosa then concluded that Greco was Ruggiero's delivery man (A. 810).

This whole, drawn-out scenario was conducted in order to elicit Agent Franciosa's conclusions about the facts of this case. Franciosa did not simply and generally describe the various roles of participants in narcotics transactions; he was asked to use specific facts adduced during the trial. Through his expert opinion testimony, the government connected the Cestaro/Greco arrest and the seizure of two kilograms of heroin and $150,000 in cash to the tapes, on which there were references, Franciosa testified, to the petitioners as Ruggiero's customers (A. 790-791). This was clearly a prosecutor's summation which suggested an

interpretation and organization of disparate pieces of evidence, rather than a proper subject for expert testimony.

The Third Circuit has developed a line of case law holding that, while Fed.R.Evid. 701 and 702 permit interpretation of "code-like" conversations, those rules forbid the interpretation of clear statements. *United States v. Dicker,* 853 F.2d 1103 (3d Cir. 1988); *United States v. DePeri,* 778 F.2d 963, 977 (3d Cir. 1985), *cert. denied* 106 S.Ct. 1518 (1986); *United States v. Theodoropoulos,* 866 F.2d 587 (3d Cir. 1989). In each case where interpretation of conversations was permitted, it was offered by a participant in the conversation who could elucidate the context, or the conversations involved the use of an *elaborate* code. The limiting principles of Rules 701 and 702 -- that an expert's testimony must be helpful to the jury -- were infinitely expanded in this case where the expert could not bring to bear his perceptions as a participant in ongoing conversations and the quoted statements were clear enough. At a maximum, Franciosa's testimony should have been limited to an opinion that the conversations were narcotics-related, and only where narcotics were not specifically mentioned. He should not have been permitted to continually highlight and restate the evidence.

In *United States v. Nersesian,* 824 F.2d 1294 (2d Cir. 1987), *cert. denied,* 108 S.Ct. 355, the Second Circuit explicitly recognized the dangers attendant to uncontrolled use of expert testimony in narcotics cases: "such use of expert testimony may have the effect of providing the government with an additional summation by having the expert interpret the evidence;" and, "an expert may come dangerously close to usurping the jury's function." *Id.* at 1308. In *Nersesian,* the expert was only allowed to testify at trial that coded conversations, involving words like cheese, room and car, were narcotics-related. He was not permitted to specify the particular drug discussed, except where mention of price or some other concrete fact made the substance referred to identifiable to an expert. *Id.* at 1307-1308. In the case at bar, Franciosa went far beyond testifying that certain conversations were narcotics-related.

He consistently specified the narcotics discussed, either cocaine or heroin, even when price was not part of his analysis (A. 699, 702, 718, 780). Moreover, Franciosa interpreted, translated, simplified and connected up each and every conversation he addressed. He delivered the prosecutor's summation by summarizing the evidence and he usurped the jury's function by putting all of the evidence together for them with the imprimatur of an "expert."

In *United States v. Garcia*, 848 F.2d 1324, 1335 (2d Cir. 1988), the Second Circuit stated that a DEA expert's testimony is "subject to challenge only when the expert interprets and draws conclusions from the evidence instead of simply testifying as to the jargon of the drug trade." In the case at bar, virtually all of Franciosa's testimony was an interpretation of the commonplace words spoken on tape and a specific conclusion about their meaning as part of or in anticipation of an actual narcotics transaction. Thus, Agent Franciosa's testimony was inadmissible under Fed.R.Evid. 702; and was prohibited by Rule 403 as unduly prejudicial.

Certiorari should be granted in order to consider the necessity of imposing limitations on the burgeoning practice of using expert testimony in narcotics cases as a substitute for direct evidence.

CONCLUSION

The petition for a writ of certiorari should be granted.

Dated: New York, New York
August, 1989

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APPENDICES

Appendix A
Decision of the United States Court of Appeals for the Third Circuit Dated June 12, 1989

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

NO. 88-5705

UNITED STATES OF AMERICA

vs.

SQUITTIERI, ARNOLD
A/K/A "Zeke"

Arnold Squittieri, Appellant

NO. 88-5706

UNITED STATES OF AMERICA

vs.

SISCA, ALPHONSE
a/k/a "Funzi"

Alphonse Sisca, Appellant

Appeal from the United States District Court
for the District of New Jersey (Camden)
(D.C. Criminal No. 87-00198-01-02)
District Judge: Honorable Stanley S. Brotman

Appendix A
Decision of the United States Court of Appeals for the Third Circuit Dated June 12, 1989

Submitted Under Third Circuit Rule 12(b)
Argued Friday, May 26, 1989

BEFORE: BECKER, STAPLETON and GARTH, *Circuit Judges*

JUDGMENT ORDER

After consideration of the contentions raised by appellants Arnold Squittieri (Appeal No. 88-5705) and Alphonse Sisca (Appeal No. 88-5706), to wit:

1. did the court below abuse its discretion by admitting evidence of other crimes under Rule 404(b), F.R.Evid.?

2. did the court err as a matter of law by admitting Sisca's alleged statements about Squittieri during the Lewisburg Prison conversation?

3. did the court below abuse its discretion by admitting evidence of certain electronically recorded conversations without proper proof of their authenticity?

4. did the court below err by admitting into evidence certain expert testimony and opinions interpreting clear language and relating to the nature of the ultimate transactions sought to be proved?

5. did the court below commit reversible error by instructing the jury on a preponderance of the evidence standard?

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It is ADJUDGED AND ORDERED that the judgment of the district court be and is hereby affirmed.

By the Court,

/s/_____
Circuit Judge

ATTEST:

/s/_____
Sally Mvros, Clerk

DATED: June 12, 1989

Certified as a true copy and issued in lieu of a formal mandate on July 5, 1989.

Test: /s/ Betty J. Robinson
Deputy Clerk, U.S. Court of Appeals for the Third Circuit.

Appendix B
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This, Judge, I don't intend to suggest in anyway I am withdrawing the earlier position.

THE COURT: I understand.

Do you want to respond?

MR. GLEESON: Yes. All the cases cited in our memorandum deal with why they trust this person to commit the crime that is the subject of it. If he is using stolen packages with Pasqua, it does not mean he has the requisite trust to deal heroin 20 years later.

THE COURT: All right. I'm going to rule. I have reviewed this, checked the cases. You haven't convinced me to the contrary and I'll rule.

The issue presently before me is the admissibility pursuant to Rule 404(b) of the Federal Rules of Evidence of prior similar acts evidence and testimony. Specifically the government seeks to introduce one, the 1973 conviction of defendant Alphonse Sisca for conspiracy to distribute narcotics, and two, the sale of a load of stolen quinine to defendants Alphonse Sisca and Arnold Squittieri by a government witness who will testify as to the alleged transaction.

In support of its motion, the government contends that the evidence of Sisca's prior conviction and the testimony regarding the alleged quinine sale to defendant is relevant as to the defendants' knowledge of Angelo Ruggiero's extensive narcotics business and their intent to engage in conspiracy to violate the narcotics laws. Defendants contend, however, that the government seeks to introduce this evidence of prior bad acts solely for the impermissible purpose of showing that the defendants' propensity to commit the crime for which they have been charged.

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Having heard oral arguments on the issue and having considered the written submissions of the parties, this Court hereby grants the government's motion to admit the prior bad acts in evidence.

There is no dispute among courts and commentators that Rule 404(b) of the Federal Rules of Evidence prohibits the introduction of evidence the sole purpose of which is to prove the criminal character or disposition of the accused. J. Weinstein and M. Berger, *Weinstein's Evidence* paragraph 404[08] at 404-53. However, the language of the Rule itself provides for the admissibility of other crime evidence for the purpose of proving motive, opportunity, intent, preparation, plan, knowledge, and identity or absence of mistake or accident.

The courts in this circuit have considered Rule 404(b) in the broadest possible sense, adopting the inclusionary approach of admitting all bad acts evidence unless it is offered solely to show that the defendant has criminal propensity *See, e.g., United States versus Long,* 574 F.2d 761, pages 765 through 767, Third Circuit 1978.

The decision regarding the admissibility of bad acts evidence is vested in the sound discretion of the trial who must make an initial determination as to relevancy of the evidence or testimony sought to be introduced and then balance the potential prejudicial impact against the probative value. *United States versus Moore,* 732 F.2d 983, 987, D.C. Circuit, 1984. Defendants contend that neither intent or knowledge are issues in this case, since their defense will be one, essentially of denial that the narcotics transaction action ever occurred. This Court cannot agree.

One of the elements of proof required to obtain a conviction for conspiracy to distribute narcotics, pursuant to 21 U.S.C. Section 846, and for the unlawful distribution of narcotics, pursuant to 21 U.S.C. Section 841, is that the

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defendants acted intentionally. Regardless of whether the defendants put intent into issue, the government, in its direct case in chief must prove beyond a reasonable doubt that the defendants actually intended to engage in the unlawful conspiracy and intended to distribute the controlled substance. Thus, under 404(b), where intent is an element of the crime or crimes charged, the government need not lay in wait for the defendant to either put on his case or proffer a defense theory, but may anticipate a defense of lack of intent. *See United States versus Jardin,* 552 F.2d 216, 219, Eighth Circuit, 1977.

At bar, the government has indicated that it intends to prove that the Patio Deli in Queens, New York, was a meeting place of the conspirators. Through circumstantial evidence, the government intends to show that defendants met with Angelo Ruggiero and others at the Patio Deli on at least several occasions, that and the purpose of these meetings was to negotiate their narcotics transaction. In addition, the government plans to offer the testimony of an FBI agent who observed one of the defendants leaving the Patio Deli carrying what looked like a package under his overcoat.

The defendants do not intend to deny that such meetings with Ruggiero and others never took place. Rather, they tend to offer proof that the nature of the meetings involved legitimate business dealings. Under Rule 404(b), evidence of prior bad acts which tend to undermine a defendant's innocent explanation for his act will be admitted. J. Weinstein and M. Berger, *Weinstein's Evidence,* Paragraph 404(12) at 404-84. Here, the government seeks to introduce evidence of Sisca's 1973 heroin conviction and testimony regarding the alleged 1968 sale of stolen quinine to the defendants for precisely the purpose of undermining their innocent explanation for their meetings at the Patio Deli with Ruggiero.

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In weighing the probative value of the prior two act against the possibility of unfair prejudice this Court must tilt the balance in favor of admission. Federal Rule of Evidence 403 does not suggest the exclusion of evidence which is prejudicial since most evidence is prejudicial or it isn't material. 403 suggests the exclusion of evidence which is unfairly prejudicial. This Court concedes that the admission of Sisca's prior heroin conviction and testimony regarding the alleged 1968 quinine purchase into evidence is prejudicial and that it is simply adverse to the defendant's interests. However, where those prior acts are relevant to the issue of intent, this introduction is certainly not unfair. On contrary, it is highly appropriate under the circumstances.

Therefore, for the foregoing reasons the government's motion to introduce evidence of the defendant Sisca's 1973 heroin conviction and regarding the alleged 1968 sale of quinine of defendant Squittieri and Sisca is granted.

Now, let's proceed with the openings.

MR. BREITBART: May I suggest, your Honor, that he be precluded from opening on that because I believe there is a factual element in your findings which is not correct. There is going to be no offer of proof as far as any discovery we have that either of these men had a package under his jacket at the Patio Deli.

THE COURT: I'm taking the government's theory of the case.

MR. BREITBART: I'm being careful. I don't believe ...

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Admitting Tape Recordings As Properly Authenticated

UNITED STATES DISTRICT COURT
DISTRICT OF NEW JERSEY

UNITED STATES OF AMERICA
Plaintiff

v.

ARNOLD SQUITTIERI and ALPHONSE SISCA
Defendants

Criminal No. 87-198 (SSB)

OPINION

APPEARANCES:

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Attorney for Defendant Alphonse Sisca

BROTMAN, District Judge:

This matter is presently before the court on the renewed application by the government to offer into evidence government exhibits 700, 800, 900, 1001 *et seq.*, 1001(b) *et seq.*, and 1101 *et seq.* (hereinafter referred to collectively as "the surveillance tapes" or "the tapes") on the ground that it has properly authenticated these tapes by establishing a proper chain of custody pursuant to Federal Rule of Evidence 901(a).[1] Defendants object to the introduction of these surveillance tapes, asserting, primarily, that the government has failed to satisfy its burden under 901(a) and the corresponding Third Circuit case law of showing by a "reasonable probability" that these tapes were not tampered with or in any way altered.

In a prior oral opinion read into the record on June 22, 1988, this court sustained defendants' objection to the admissibility of the Ruggiero tapes because of the government's failure to properly authenticate them. In our prior opinion, we concluded that the testimony of

1. We note that in our prior oral opinion dated June 22, 1988, we characterized the government's offer of these tapes into evidence as, in essence, a motion made by defendants to suppress these electronic recordings. We did so because of an oral motion made by defendants on the first day of trial challenging the admissibility of these tapes in anticipation of the government's offering them into evidence. For purposes of clarity, we will hereinafter refer to this matter as the government's application for the admission into evidence of the surveillance tapes and the defendants' objection thereto.

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government witnesses Thomas Carroll and FBI Agent William Noon, *alone,* was insufficient to create a "reasonable probability" that the evidence had not been tampered with or materially altered. A paramount consideration in our prior decision was the absence of any personal knowledge by either of the government's two witnesses as to the fate of the original surveillance tapes from the time they were delivered to the Brooklyn-Queens office of the FBI up until the date they were sealed by the court.

Steadfast in our belief that the government had failed to satisfy its burden, we denied its motion for reconsideration, but, upon further reflection, granted it leave to produce additional authentication witnesses before the close of its case in order to convince this court that the highly damaging evidence it sought to offer was, in fact, precisely what it purported to be -- namely, taped conversations involving or referring to defendants Arnold Squittieri and Alphonse Sisca or their alleged co-conspirators. In order to avoid any possible confusion stemming from this court's June 22 oral ruling, we formally vacated that prior Opinion and Order, on the record, on June 24, and afforded the government an opportunity to seek the introduction of those tapes before the conclusion of its case-in-chief. Having heard the supplemental testimony of FBI Agents Walter Ticano, Donald McCormick and Gerard Callahan, we conclude that the government has succeeded in doing what it failed to do initially -- making out a *prima facie* case for the authenticity of the surveillance tapes through a showing by a "reasonable probability" that they were not tampered with or in any way altered.

Federal Rule of Evidence 901(a) states that "[the requirement of authentication or identification as a condition precedent to admissibility is satisfied by evidence

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sufficient to support a finding that the matter in question is what its proponent claims." Rule 901(a) must be read in conjunction with the general relevancy rule of 104(b) because in the absence of a showing of authenticity, the evidence is simply irrelevant and cannot be introduced. J. Weinstein and M. Berger, *Weinstein's Evidence*, Paragraph 901(a)[02], at 901-20.

Under Rule 901(a), there are several methods by which the authenticity of the tape recordings can be established. First, the proponent can offer the testimony of a party to the recorded conversation who can then testify to the fact that he has listened to the tape and has concluded that it fairly and accurately depicts the true nature of the conversation. Second, the proponent can offer the testimony of a witness to the conversation who may compare what he heard with what is sought to be introduced at trial. Finally, the proponent may present evidence of its chain of custody through the testimony of those who have personal knowledge of the route traveled from the time of its making until its production in court. At bar, the government does not seek to authenticate the tape recordings of the conversations overheard through the oral and wire intercepts of Ruggiero's home and telephones based upon the first and second methods described above. Rather, it seeks to "sink or swim" solely on the chain of custody method of authenticating physical evidence.

We agree with the government that the Third Circuit standard for authentication based on a chain of custody theory is not the elevated "clear and convincing" standard. Rather, the government must merely convince the trial judge that "there is a reasonable probability that the evidence has not been altered in any material respect since the time of the crime." *See United States v. Jackson*, 649 F.2d 967, 973 (3d Cir.), *cert. den.*, 454 U.S. 1034 (1981)

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[citations omitted]. Whenever proffered evidence is challenged on grounds of authenticity, it should only be admitted after a *prima facia* showing that it is what the proponent claims it to be. *United States v. Goichman,* 547 F.2d 778, 784 (3d Cir. 1976). Thus, at bottom, Rule 901(a) "requires only that the court admit evidence if sufficient proof has been introduced so that a reasonable juror could find in favor of authenticity or identification." J. Weinstein and M. Berger, *Weistein's Evidence,* Paragraph 901(a)[01], at 901-17. We note, too, that a district court has broad discretion in determining the admissibility of evidence, and such a determination will not be disturbed on appeal unless there is a clear showing of an abuse of that discretion. *See United States v. L'Allier,* 838 F.2d 234, 242 (7th Cir. 1988).

Although the standard for the authentication of tape recordings is concededly a low one, it does have some "bite" to it. Mere speculation or conjecture as to the circumstances surrounding the transfer of tape recordings from one custodian to another does not satisfy the Third Circuit's "reasonable probability" standard. It is, of course, not necessary for the proponent to produce each and every individual who "handled" the tapes during their journey through the chain. Nor will a mere showing by the party opposing admission that an opportunity existed for unlawful tampering justify the exclusion of otherwise admissible evidence. *United States v. Coades,* 549 F.2d 1303, 1306 (9th Cir. 1977). However, the proponent must convince the court that there exists substantial evidence from which a reasonable jury could infer that the tapes are, in fact, authentic. *Goichman,* 547 F.2d at 784.

Our prior opinion found the testimony of Agent Noon, standing by itself, wholly inadequate to establish by a "reasonable probability" that the tapes were neither

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tampered with nor altered. In that opinion, we found Noon's testimony unilluminating as to the chain of custody of the surveillance tapes from the time they left the monitoring agents' hands until the time they were sealed by the court. We concluded that Noon lacked both personal involvement and personal knowledge of the fate of those tapes during this crucial intervening period, and could offer only conjecture and speculation as to their handling once he had released custody. However, since our prior ruling denying the admissibility of the tapes, the government, at our insistence, has come forward with the type of evidence it should have presented initially -- namely, testimony of those agents who had personal knowledge of the handling of those tapes at each of the crucial links in the pre-sealing chain of custody. We believe that nothing short of the testimony of Agents Noon, Ticano and Callahan would have satisfied the government's burden of showing by a reasonable probability that the tapes had not been materially altered, since the absence of even one agent's testimony would have left broken a significant link in the chain.

Agent Noon's primary task during the eight-month surveillance of Ruggiero's home and telephones was to monitor the incoming and outgoing phone calls. As a designated "monitoring agent," it was one of Noon's responsibilities to ensure that both the original and duplicate original recordings were safely transported to the Brooklyn-Queens office of the FBI. Noon testified from personal knowledge that it was the practice and procedure of the monitoring agents to place both the original and duplicate original recordings in a chain of custody envelope, formally "accept custody" of the tapes by signing their names in the appropriate column, deposit those tapes in a locked credenza within the office of Supervising Agent Mouw (located at the FBI's Brooklyn-Queens branch), "release

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custody" by again signing or initialing the appropriate column, and finally lock Mouw's office before they left for the evening. Agent Noon testified not only to the standard operating procedures employed by monitoring agents of the FBI, but also to the procedures used in the handling of the Ruggiero tapes themselves. It is his refreshed recollection as to the handling of these specific tapes during the first link in the chain which we find particularly significant.

From the monitoring agents, custody of the tapes would then pass to Agent Walter Ticano, the next crucial link in the custodial chain. Agent Ticano testified that at 5:00 a.m. each weekday, he would appear at Mouw's office, unlock the credenza and accept formal custody of those tapes which had been left overnight by the monitoring agents. It was his responsibility to perform the so-called "administrative functions" to preserve the integrity of the tapes, which included an external review of the original and duplicate reel-to-reels to ensure that they had been properly labeled, dated and signed by the monitoring agents, and to ensure that each individual reel had been properly placed in its corresponding chain of custody envelope. Ticano testified that after performing his administrative tasks, he would formally accept custody of the tapes by signing in the designated area on the chain of custody envelope and then deposit the tapes into a locked filing cabinet in Mouw's office. Ticano stated that he was the only FBI agent with a key to that locked cabinet, and that any agent wishing to gain access to those tapes had to do so through him.

We also learned from the witness stand that the original reel-to-reel recordings remained secured in a cabinet locked inside Mouw's office from the time Ticano accepted custody until the time they were sent to the court for sealing. The only deviation from this practice would occur when, upon determination by the case agent, the originals

were sent to the FBI office in New York for enhancement. Ticano testified that approximately ten (10) percent of all the "bug" tape originals in this case were sent to New York for enhancement prior to their judicial sealing. Defendants contend, *inter alia,* that the "presumption of regularity" in the handling of exhibits by public officials has been rebutted by a showing that (1) more than one original recording was released at a time for enhancement, (2) the FBI failed to maintain a log or, at minimum, a list reflecting the current inventory of original recordings maintained in the locked filing cabinet and (3) the originals may have passed through the hands of numerous FBI agents from the time custody was released by Ticano for enhancement until the time that they were finally returned to the Brooklyn-Queens office and prepared for sealing. We cannot agree.

Neither Federal Rule of Evidence 901(a) nor the corresponding case law requires the proponent of the physical evidence to present a flawless chain of custody mechanism to the court in order to establish authenticity. We acknowledge that the government's handling of the Ruggiero surveillance tapes from the time of their creation up through the time of trial has hardly been exemplary, and we would counsel both the FBI and the United States Attorney's Office for the Eastern District of New York to establish more efficient and accountable procedures for their preservation in the future. However, the current state of the law, perhaps unfortunately, requires no more than that the proponent show that "there is a reasonable probability that the evidence has not been altered in any material respect since the time of the crime." *United States v. Jackson,* 649 F.2d at 973. The fact that the FBI utilized chain of custody procedures which were less than optimal does not destroy the presumptive authenticity of the surveillance tapes.

At bar, the cross-examination testimony of Agents

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Ticano, Callahan and McCormick does reveal minor, unaccounted for gaps in the chain from the time the original tapes left the office in Brooklyn-Queens for enhancement until the time that they were returned to that office in preparation for sealing. However, we do not view these gaps as legally significant. Agent Gerard Callahan testified that both he and another audio technician, Judith Hand, accepted for enhancement purposes, custody of the original tapes upon their arrival at 26 Federal Plaza in Manhattan. While the tapes were in his custody, they were secured in a locked cabinet within the offices of the FBI to which only he, his co-technician and his supervisor had a key.It was Callahan's responsibility to, first, duplicate the original "bug" tapes and, second, to then either enhance and/or "gain raise" the duplicate copies through the use of a filtering device. Having completed his limited task, Callahan would then release custody of the tapes to another FBI agent who would transport them back to the Brooklyn-Queens office where Ticano would accept custody once again by depositing them once again into the locked file cabinet.

Defendants contend that several of these original "bug" tapes remained outside of the locked cabinet and in the custody of agents other than Ticano for lengthy periods of time during which they were exposed to countless numbers of FBI agents who could conceivably have tampered with them. They cite, for example, an original "bug" tape which remained in the custody of Callahan from April 30 to May 13, 1982, a period of fourteen (14) days during which the tape was being enhanced and was, presumably, vulnerable to tampering. However, the law is quite clear that a mere showing that an opportunity existed for illegal tampering of the evidence does not justify its exclusion. *United States v. Coades,* 549 F.2d at 1306.

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Evidence of either bad faith or affirmative tampering is required. *Id.*

In sum, we are convinced that the testimony of Agents Noon, Ticano and Callahan, together, provides a sufficient explanation for the fate of the Ruggiero tapes from the time they were created until the time they were judicially sealed and, therefore, the government has satisfied its threshold burden under Rule 901(a) for authentication. We note, however, that while the tapes should properly be admitted into evidence as part of the government's direct case, the defendants are well within their province to contest the genuineness of these tapes and argue that point to the jury, because it is the trier of fact who will ultimately determine their credibility and probative force.

Therefore, for the foregoing reasons, the government's application to offer into evidence government exhibits 700, 800, 900, 1001 *et seq.*, 1001(b) *et seq.* and 1101 *et seq.* is granted.

An appropriate order was entered on the record on June 27, 1988.

/s/ _____
Stanley S. Brotman
United States District Judge

DATED: June 30, 1988